

THE MILITARY CHAPLAINCY

Legislative And Constitutional Concerns

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Some General Observations
Legislative and Constitutional Concerns

Legality questions pertaining to the military Chaplaincy are caught in the vortex of constitutionality concerns and the wisdom of law. "Justice Felix Frankfurter once suggested that as a nation, Americans seemed preoccupied with a false value in their primary concern with the constitutionality rather than the wisdom of law."¹ To demonstrate an acceptable balance or meaningful blending of these two historic dimensions of public concern, particularly as they affect the chaplaincy, requires the development of norms or static guidelines for resolving conflicts of interest while still providing a ministry ^{viable} A for service members and their families. At this point, the norms have not been developed. However, with the growing 'ground-swell' of concern for strict adherence to the letter of Constitutional provisions, the day of reckoning looms on the horizon. It is then that the still undeveloped norms and guidelines for reconciling strict constitutionality matters with the "Wisdom of Law" will have to be applied. For the climate of debate between those opposing the current nature and form of the chaplaincy and those favoring its continuance can be expected to lead to congressional or high level court action in the not too distant future. The bibliography of this paper lists books and articles upon which the author of this paper bases this opinion of inevitability.

¹. Ray A. Appelquist, D.D., Church, State and Chaplaincy, (Wash., D.C., General Commission on Chaplains), c. 1969, p. 8.

SOME HISTORICAL DATA

As is still demonstrated by current practice, chaplains have been appointed in the Armed Forces of the United States on the basis of statutory authority granted by the Congress. The primary applicable statutes are found in Title 10 of the U.S. Code, paragraph 3073.² These laws go back to the Revolutionary War when the Continental Congress, in response to General George Washington's urging on July 29, 1775 provided for chaplains in the Continental Army by resolving to pay them twenty dollars per month.³ The first formal authorization for the appointment of chaplains by the Congress came on March 3, 1791.⁴ David Fellman states that "the very first Congress which wrote the First Amendment provided for chaplains in ... the armed services."⁵ This was quoted by Mr. Justice Douglas in his concurring dictum in the Supreme Court's *Angel vs. Vitale* decision of June 1962.⁶ Chaplains have served in the armies of Christian nations since the fifth century.⁷ In enacting legislation authorizing chaplains it has been held that "the Congress was simply exercising its authority under the Constitution to 'raise and support Armies' and to make Rules for the Government and Regulation of the land and naval Forces" (Art. I, sec. 8). Here

2. See also other important provisions of Federal law applicable generally or specifically to Army chaplains, see paragraphs 591-595, 3036, 3064, 3212, 3217-3221, 3262-3265, 3293, 3295-3300, 3303, 3353 and 3561 of Title 10 and paragraph 305 of Title 32.
3. Journals of the Continental Congress, (Wash., D.C., Government Printing Office, 1905) II, 220-221.
4. Records of Continental Congress, Section 5, Ch. XXVIII, 1 Stat., 222 as quoted in Pamphlet by Chief of Chaplains, U.S. Army, Wash., D.C. 26 June 1962.
5. David Fellman, *The Limits of Freedom* (Brunswick, N.J., Rutgers U.Press, 1959) pp. 431.
6. See *The United States Law Week*, Vol. XXX, no. 50, 4554, col. 2, n.1, 26 June 1962.

recently this has been called into very serious question, not only by individual citizens, but by various religious leaders, denominational bodies and concerned citizens groups. Acting as official spokesmen for their groups, many of these persons have aroused a significant amount of public concern so that the outcry cannot be ignored.

Resting on the "wisdom of the law" side of these matters, justification for the presence of chaplains in the Armed Forces was based on a fundamental principle that access to religious services and ministrations raised the morale and effectiveness of a fighting force.

Responding to challenges as to its legality, both the Congress and the Supreme Court have upheld the military chaplaincy on the ground that this institution was necessary to fulfill the State's obligation to its soldier citizens; that it is imperative to extending the rights provided by the Freedom Clause of the First Amendment and that it was not in essential conflict with the Establishment Clause of the same Amendment.

By these acts of litigation, the United States followed with some modifications the traditions of nations of the Western World of providing religious ministrations for members of their military forces. As already noted, this custom is rooted in antiquity, having biblical rootage. 8

7. A.H.H. Jones, "Military Chaplains in the Roman Army," Harvard Theological Review, Vol. XLVI, No. 4, October 1933, pp 239-240.

8. Deuteronomy 23:36, Numbers 22-24, Joshua 24:9,10.

In October 1946 it was declared the "policy of the Government to encourage and promote the religious, moral, and recreation welfare and character guidance of persons in the Armed Forces and thereby to enhance the military preparedness and security of the nation."⁹ But attendance at religious services cannot be made compulsory. The Chaplains' services as ministers of religion may not be forced on anyone and those who do not desire such services were (and still are) free to reject them. There was one exception to this until early in 1972 when compulsory Chapel attendance at the three service academies was declared unconstitutional as a result of several suits brought against the Department of Defense by individual cadets.

The rationale for justifying the military chaplaincy on legal grounds ran something like this: military services deprives service members (and in some cases their dependents as well) of a choice environment. Everyone concedes that the military must make available to such persons mundane necessities and amenities (food, shelter, medical and dental care, transportation, mail service, recreational and educational facilities, etc.) Justice similarly obligates the government to furnish to them, as far as it is practicable, access to the religious "ministrations of their own religious faith in such ways and on such occasions as are appropriate to their respective denominational requirements" (para. 3d, AR 165-15).¹⁰ Ultimately the most effective way of doing so has proved to be the military chaplaincy as developed in the Armed Forces of the United States, which gives

9. Executive Order 10013, October 27, 1948.

10. Army Regulation 165-15 as quoted from the 1963 edition has been revised since that time. Content remains essentially the same on this point. The Air Force and Navy have similar regulations.

"official recognition to the military need for spiritual guidance on the basis of freedom of worship". 11

On 1 October 1950, the civic leaders, educators, and sociologists comprising the President's Committee on Religion and Welfare in the Armed Forces affirmed in The Military Chaplaincy: A Report to the President:

"The military chaplaincy program is an integral and vitally important phase of the varied program of our Armed Forces to meet the responsibilities of the Government to promote the general welfare of the men and women of the Armed Forces. The religious programs and services of the Armed Forces, in addition to their primary spiritual values, are an essential part of an attempt to make available an environment and services which will improve the general morale, promote military efficiency and enhance national preparedness and security." (P. 1). 12

In general, the Founding Fathers held to the interpretation of the Constitution given above; the single major exception was James Madison. 13 The constitutionality of chaplains was challenged in the House of Representatives in 1854 on the basis of both Article VI and the First Amendment; the House Committee on the Judiciary rejected the challenge as invalid. 14 In 1912, Secretary of the Interior Walter L. Fisher, in a ruling supported by President William Howard Taft, observed that "the Constitution did not forbid appropriations for

11. Ibid.

12. Quoted in paper on Chaplaincy published by Chief of Chaplains, D.A. op. cit., p. 2.

13. For statements by him see Anson Phelps Stokes, Church and State in the United States (N.Y.: Harper, 1950), III, 127f., 595.

14. op. cit., III, 112, 132.

religious purposes but the establishment of a State Church and the union of Church and State; and that this prohibition was not violated by appropriations for religion since Congress supported chaplains in the Army and Navy." ¹⁵ The President of the American Association for the Advancement of Atheism brought suit in the late twenties of this century against the Treasurer of the United States with a view of having chaplains eliminated from the military payroll; the court dismissed the action on the ground that the plaintiff "did not, as a taxpayer, have a sufficient interest to maintain the suit." ¹⁶

A more recent effort on record to remove chaplains from the Government payroll, a suit against the Treasurer of the United States brought by a professed atheist, Frank G. Hughes of Minneapolis, on the ground that the use of tax money for payment of salaries and allowances to chaplains was unconstitutional, was dismissed in the Federal District Court at Washington, D. C., by Judge Edward A. Tamm in December 1955 on the ground that the plaintiff "does not have status to maintain the action" and that his complaint failed to "set forth a cause of action." ¹⁷

During the Vietnam period, some individuals ~~had~~ voiced the opinion that the Supreme Court's decision of June 1963 in the Schempp and Murray cases, which forbade the reading of the Bible and the recitation of the Lord's Prayer in public elementary schools, by implication makes the military chaplaincy unconstitutional. A careful reading of the decision and of the concurring dicta, however, indicates that if anything,

15. op. cit., II, 292.

16. op. cit., III, 595.

17. Religious News Service, Domestic Service, 21 December 1955.

the present Supreme Court Justices take the opposite position.

The Supreme Court decision notes that "each House of Congress provides through its Chaplain an opening prayer." The very next sentence reads: "Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of the military service wish to engage in voluntary worship."¹⁸

In a footnote the Court observes: "We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of Government facilities, military personnel would be unable to engage in the practice of their faiths."¹⁹

In his concurring dictum Mr. Justice Brennan referred to "certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example...It is argued that such provision may be deemed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces...those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity

18. The United States Law Week, Vol. XXXI, No. 49, 16 June 1963, pp. 4685-4686.

19. Ibid., p. 4689, n. 10.

to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantee, provide substitutes where it requires such persons to be...Such activities and practices seem distinguishable from the sponsorship of daily Bible reading and prayer recital. For one thing, there is no element of coercion present in the appointment of military...chaplains; the soldier...who declines the opportunities for worship would not ordinarily subject himself to the suspicion or obloquy of his peers. The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion...Hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for...soldier cut off by the State from all civilian opportunities for public communion." 20

THE CHALLENGE FROM WITHIN

During the 1920-1940 period when the pacifists were making an all out push to fulfill their stated purpose of destroying the U. S. Army Chaplaincy under the theme "get the church out of the war business", they had four major avenues of approach along which they pressed their attacks. These were:

1. Churches should stop recommending ministers for the chaplaincy because the war system is against the Gospel.
2. The Commission on Chaplains should be abolished, for it represents a contradiction to the Church's stand against war.
3. Chaplains should not wear the uniform or distinctive military insignia, have rank, or be paid by the government because the officer status of the chaplain hurts his relations with officers and enlisted men.
4. The Chaplaincy violated the principle of separation of church and state.

20. Ibid., pp 4711-4712.

These four points of disputation are still with us and have been variously debated by clergymen and others, especially during the period of intense opposition to American involvement in combat activities in Southeast Asia. The most intense debates erupted between 1967 and 1972. Much of the content of these exchanges and studies demonstrates a serious concern for the fourth point, the principle of separation of church and State.

Under the broadened scope of this contention that the military chaplaincy violated the church-state provisions of the U. S. Constitution, numerous denominations conducted studies, authorized analysis of the military chaplaincy and generally demonstrated a willingness to search for and experiment with new forms of ministry to military personnel. Other groups expressed their opposition to the military in general by attacking the chaplaincy in particular, seeking to mark the chaplaincy as the point of significant and near total compromise of the churches with the "immorality" of a government that was waging war against weak and helpless people in Southeast Asia. In one such expression as early as May 1964, a clergy delegate by the name of Smith introduced a resolution at a plenary session of the Methodist Church in General Conference in Pittsburgh, Pa. Declaring that the church should go on record as opposing "the presence of Methodist ministers in the U. S. Army, Air Force, Navy and Coast Guard and in their wearing of the uniform and their holding the rank of officers such as Captains, Majors, Colonels and Generals."²¹

21. See Minutes of the General Conference of the Methodist Church, 1964. (Nashville, Tenn.: Abingdon Press, 1964).

The resolution failed by a narrow margin, but the fact that it got that far in a body representing 10 million U. S. Methodists is significant. This type of opposition to the chaplaincy has not died out, but has been expressed in new attempts to accomplish the objective that delegate Smith expressed in 1964.

Arthur Carl Tiepkorn, a retired U. S. Army Reserve Chaplain and probably the Army's most knowledgeable clergyman on the history, achievements and challenges to the chaplaincy, once stated that "Historically, there has been an increasingly prominent negative factor within organized Christianity hostile to the historic form of the American military chaplaincy." ²² He attributed this in our era, at least in part, to "the link-up of academic secularism with militant secularism", ^{and}, the "sensitive and tender conscience of the organized religious community", "residual prejudice that has dictated mindsets and strategies and tactics" among the religious of our day. ²³

In a thirty-eight page paper on "Religious Relevancy and the Military Chaplaincy" by the Chairman of the U. S. Army Chaplain Board on February 3, 1971, the writer states that "perhaps the biggest threat to the chaplaincy will come from changes in American beliefs which will tear down traditional ways and ideas pertaining to religion." ²⁴ Whatever the sources of the threats, they have forced a re-examination

22. Address at First U.S. Army Chaplain Training Conference, Ft. Meade, Md., Nov. 4, 1969.

23. Ibid.

24. Quoted from Preface to Religious Relevancy, Modern Society and the Military Chaplaincy, an official report by the U.S. Army Chaplain Board to the Chief of Chaplains, 3 February 1971.

of the chaplaincy through consideration of such questions as "Why Chaplains?", "Should the military chaplaincy be civilianized?" and careful consideration of the meaning of the presence of clergymen in the military command structure. In an effort to address the first question, why chaplains?, Dr. Martin H. Scharlemann also touched on all the others, when he said,

"The military chaplain, moreover, is part of the military structure to function in that particular context as a servant, in the full biblical sense of the word. He is present to serve men at the level of their deepest needs. His program is a reminder that men must be thought of in their totality. They are more than body and soul; they are also spirit and so relate, in some way or other, to their Maker and Redeemer, whether in terms of acceptance or rejection. ...The military environment is the context within which the chaplain performs his tasks. He is at work there by right and not by sufferance, for our nation insists that the things of God rate this kind of priority." 25

But not everyone will agree with Scharlemann's last assertion.

In fact, that is the rub, can the government insist on any priorities when it comes to the things of God? As far as the chaplaincy is suspected of being involved in that insistence, there are many who render an emphatic 'no!' Scharlemann's position seems antiquated, though authentic. It reflects the 'wisdom of the law' very well.

Among the informative writings that address matters pertaining to church, state and the chaplaincy is a book by that name edited by A. Ray Appelquist, Executive Secretary of the General Commission on Chaplains and Armed Forces Personnel. 26 This paperback is the most comprehensive

25. Martin H. Scharlemann, "Why Chaplains?" published in "The Military Chaplain", The Military Chaplains Assoc., Wash. D.C. (date not known but assumed to be 1969 or 1970. Scharlemann is a Reserve Air Force Chaplain, rank of Brigadier General and Prof. at Concordia Seminary, St. Louis, Mo.)

26. *See* *cit.*

assembly of denominational views, positions and recommendations for the period of 1965-1969 on the subject of this paper that exists. In fact, there is a paucity of material on this subject generally.

Appelquist records the findings of a National Study Conference on Church and State held in February 1964, wherein it addressed the military and institutional chaplaincies and found "the structures of the chaplaincy as currently organized and administered in our country... in general a viable response to the common need of both religious bodies and the government to provide for the free exercise of religion without an establishment of religion." ²⁷ This mood of approbation, almost characteristic of the mainline denominations in 1964 appears as somewhat of a minority view by 1972 - though this observation cannot be statistically proven at this point. Nonetheless, by 1972: the United Church of Christ had registered its opposition to the continuation of the military chaplaincy calling for the establishment of a civilianized ministry to service personnel. After considerable study and consultation by UCC leaders, a proposal to establish civilian models of ministry to the military was approved. The first model was to be established in October 1973 in Columbia, S. C. (near the Army's Fort Jackson training center). Whether or not this model was in fact established is unknown to this writer. But the basic assumption of the UCC in going this route was that the ministry of the church in the military via the chaplaincy was too compromised or muzzled or too

27. Ibid., p. 23.

defiant of church-state-constitutional ~~concerns~~ to merit continuance.

The chaplaincy was concluded to be an "abuse" that had to be altered.

The decision to pursue the civilization project by the UCC hinged at least partially on a document drawn up in October 1971 by the United Church Board for Homeland Ministries entitled "The Abuses of the Military Chaplaincy".²⁸ This project was designed to "obtain research that would test the feasibility of court suits (against the chaplaincy/military) and furnish the foundation for such litigation if possible."²⁹ The document lists numerous abuses, but all of them seem to center in the contention that the chaplaincy has established a "military religion" quite in contrast to its stated authorizations and purposes.

At this point in time, no denomination has decided to test the constitutionality questions that have troubled more and more concerned churchmen in the past decade. Should the test be made and a conclusion reached in favor of the "letter" rather than the "wisdom of the law" and the current form of the chaplaincy were rejected, the result would be chaos, for it is only the UCC which at this point has any alternate plan for continued ministry in this area.

THE CHALLENGE FROM WITHOUT

There has been very little challenge to the chaplaincy from outside the religious community in America. That which has touched it in the last decade has usually been associated with other litigation such as the school prayer issue and cases involving conscientious objectors to

28. "Abuses" was not published, though draft copies were circulated beyond the authorizing committee.

29. Ibid., p. 1.

military service. In this regard, Floyd Robertson, Executive Secretary of the National Association of Evangelicals included this comment in his newsletter to constituents in August 1970 under the heading "Supreme Court":

"Mr. Chief Justice Burger wrote the opinion for the Court upholding tax exemptions for church property (*Walz v. Tax Commission*), handed down on May 4, 1971. It may be wishful thinking on my part, but I fancied that I saw a glimmer of light at the end of the tunnel signifying an end to the Court's lightly casting aside good practices rooted in the very warp and woof of our society. Listen to the Chief Justice's reasoning in that opinion and apply it to the chaplaincy: 'It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice...openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside. Nearly 50 years ago Mr. Justice Holmes stated: "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.' *Jackman v. Rossenbaum*, 260 U.S. 22, 31 (1922)." 30

The American Civil Liberties Union, which cooperated with the FCC in creating "Abuses of the Military Chaplaincy" previously noted, opposes the chaplaincy as it is now structured. How soon ACLU will come forth with litigation efforts voicing its opposition is anybody's guess. But it could be soon. Judging from the supposed factual data held by ACLU to be true, that organization has grounds for rapid action. For according to one of their recent reports about a chaplain whose efforts came to their attention "It is the chaplain's job to do everything he can to help his commanding officer whip the troops into fighting frenzy." 31 With this kind of impetus to attack the "abuses", one

30. *Mac. Commission on Chaplains*, 1405 G. St., N.W., Wash. D.C. 20005.

31. See Hutchison, R.G. Jr. "Should the Military Chaplaincy Be Civilianized?", *The Christian Century*, October 31, 1973, p. 1072.

cannot expect a long delay before ACLU makes its next move.

CONCLUSIONS

Hutcheson, in the article just cited, believes that the current bevy of concern about the chaplaincy is not its constitutionality, but rather its effectiveness.³² My examination leads me to believe it is both. Hutcheson argues very logically that since the chaplaincy predates the constitution "in full view of all the legal and judicial processes, ever since, the presumption of its constitutionality is certainly sufficient."³³ That view is obsolete for two reasons. First, the chaplaincy is being challenged as it exists today, not as it existed for nearly two centuries. Prior to World War I, the chaplain was instrumentally present with the military. Since World War I he has been present both instrumentally (as an agent of his religious group) but also institutionally, (as an integrated member of the military system).³⁴ It is this latter, the institutional aspect, that tends to cancel mitigate Hutcheson's view.

But secondly, the presumption of the constitutionality of the chaplaincy cannot be assured because of the religious or irreligious climate of our times. In America, Christianity no longer provides our society with a common frame of reference, with a sense of overall meaning and with a pattern that gives a somewhat similar form to life in this country. With the displacement of this common frame of reference went the ready-made, almost unquestioned approbation of many of our

32. Ibid., p. 1072.

33. Ibid.

well-intended institutions, such as the chaplaincy. Thus the "wisdom of the law" which established and maintained the legality or appearance of legality of these institutions does not appear to be wise any longer. Or as the writer for the Army Chaplain Board wrote:

"When a King arises who knows not Joseph, so to speak, Joseph has had his day. The military ministry can probably ~~remain~~ secure if it becomes secularized to match a secularizing world. Chaplains can become counselors and guidance experts. But if a society should happen to decide that it wants prophetic religious leadership, guidance chaplains may not be needed." 24

Suffice it to say, the relationship between church and state continues to evolve. Neither institution remains static or dormant. *Numerous forces continue to play on this.* Because the chaplaincy is caught up in both institutions, both guided and controlled by ^a differing mandate, the tensions and possibilities of co promise and/or complete rejection of one by the other will continue to exist. Meanwhile, the chaplaincy must continue to serve faithfully - as faithfully as it can - "to bring men to God and God to men." The evaluation of that faithfulness will, no doubt, be a decisive factor in reaching an acceptable conclusion.

24. U.S. Army Chaplain Board, *op. cit.*, p. 37 (Report dated Feb. 3, 1971).

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